

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Revocation
of the Family Day Care License of
Connie Kerkaert

FINDINGS OF FACT, CONCLUSIONS,
AND RECOMMENDATION

This matter came on for hearing before Administrative Law Judge Barbara L. Neilson on November 5, 1998, at 10:00 a.m. in the offices of Meeker County Social Services in Litchfield, Minnesota. The Licensee, Connie Kerkaert, 560 Western Avenue, Watkins, Minnesota 55389, appeared without benefit of counsel and was represented by her husband, David Kerkaert. Michael Thompson, Meeker County Attorney, 325 North Sibley, Litchfield, Minnesota 55355-2155, appeared on behalf of Meeker County Social Services Department (the "County") and the Minnesota Department of Human Services (the "Department"). The record closed on December 15, 1998, when the last post-hearing submission was received.

This Report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record. The Commissioner may adopt, reject, or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact David Doth, Commissioner, Minnesota Department of Human Services, 444 Lafayette Road, St. Paul, Minnesota 55155-3815, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issue in this case is whether the Licensee violated various rules governing family day care licensees on an unremediated and chronic basis and failed to comply with conditions placed on her license and, if so, whether the Licensee's license should be revoked.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Licensee, Connie Kerkaert, has been licensed as a day care provider in the Watkins area since May, 1990. The Licensee was licensed to operate a Class A Family Day Care, which allows for a maximum capacity of ten children with one adult provider. The Licensee has occasionally been granted variances to care for a larger number of children. (Testimony of Otremba.)

2. Beginning in 1992, Sharon Otremba, a Relicensing Case Aide for the County, began to notice that some areas of the Licensee's home were not in compliance with the rules governing family day care operations. Ms. Otremba issued correction orders to the Licensee on April 16, 1992, April 20, 1993, April 19, 1994, and January 11, 1995. (Testimony of Otremba; County's Post-Hearing Submission received Nov. 30, 1998.)

3. On April 25, 1996, Ms. Otremba visited the Licensee's day care home. She noted several violations of the day care rules and issued a citation. The violations included the following: (1) the furnace area was accessible to children; (2) the area surrounding the wood stove needed to be protected by guards to prevent burns; (3) the Licensee's first aid kit was missing some items; (4) the rabies vaccinations of the Licensee's two cats were not current; (5) disposable diapers had to be discarded in a covered container (however, no children in diapers were enrolled in the Licensee's day care at the time); (6) up-to-date information pertaining to one child was missing from the Licensee's records; (7) the Licensee had not given a written notice to parents that she had lesser limits or no liability coverage and maintained a copy of the notice signed by the parents; and (8) the Licensee did not have adequate equipment for the number and ages of children in care (swing set was found to be inadequate). The Licensee returned the correction order and noted how each violation had been corrected. (Ex. 1; Testimony of Otremba.)

4. On April 22, 1997, Ms. Otremba again visited the Licensee's home. This visit resulted in the issuance of a correction order dated April 23, 1997. The violations noted included the following: (1) the Licensee had at least 11 children in care that day, thereby exceeding her license limits of 10; (2) the Licensee had not completed a four-hour refresher course in CPR; (3) one smoke detector was not operational on the day of the visit; (4) emergency phone numbers of parents and children's physicians and dentists were not readily available; (5) the Licensee was unable to show that rabies shots and tags were current for all cats (the Licensee said that she had two cats at the time); (6) up-to-date records were not available for all children; (7) the Licensee did not have a provider policy to be given to parents addressing such matters as the agenda for the day, what would be provided for the child, what would happen if the child was ill, disciplinary procedures, and fire and storm drills. The Licensee returned the correction order and noted how she had corrected each violation. (Ex. 2; Testimony of Otremba.)

5. Up until April of 1997, the County had visited the Licensee's home only once a year. After that time, the County representatives visited on a more frequent basis in order to monitor the Licensee's compliance with relevant rules and verify that

she had complied with the correction orders that had been issued. (Testimony of Otremba;)

6. On May 23, 1997, Ms. Otremba again visited the Licensee's residence, accompanied by Kathy Cain, the County's Day Care Licenser. They found that the following violations had occurred: (1) emergency phone numbers were not readily available; (2) provider policies were deficient and needed to be updated; (3) the gate that was by the stairs leading to the basement was not closed and did not shut properly. The County issued a written correction order to the Licensee dated May 29, 1997, setting forth these violations. (Ex. 3; Testimony of Otremba.)

7. Ms. Otremba and Ms. Cain next visited the Licensee's home on June 23, 1997. They determined on that day that the Licensee exceeded her licensed capacity by one additional child. A correction order was issued on June 24, 1997, setting forth this violation. Ms. Otremba and Ms. Cain found that the Licensee had corrected the other items noted in the correction orders they had issued previously. (Ex. 4; Testimony of Otremba.)

8. Ms. Otremba and Ms. Cain conducted another home visit on February 5, 1998. On that day, a girl who normally went to school on the bus remained at the day care home. The child's father had recently shot his girlfriend. The child became upset on February 5 and told the Licensee that she did not want to take the bus because other children on the bus had been pointing at her and making gunshot noises. The Licensee and her husband allowed the child to stay at their home that day. The Licensee called the bus company and explained the situation. Ms. Cain and Ms. Otremba issued a correction order on February 10, 1998, noting that the Licensee had exceeded her licensed capacity by one child. (Ex. 5; Testimony of Otremba, Mr. Kerkaert.)

9. In a letter dated February 9, 1998, the County recommended that the Licensee's day care license be placed on probationary status until relicensure on May 1, 1998. The recommendation was based upon the visits made by the County on April 19, 1996, April 22, 1997, May 23, 1997, June 23, 1997, and February 5, 1998, and the resulting correction orders. The County recommended that the Licensee be required to remain in full compliance with all licensing requirements during the probationary period and also develop a written plan to stay within her licensed capacity until the license was renewed. (Ex. 6; Testimony of Otremba.)

10. On April 6, 1998, after the County made the recommendation to place the license on probation but before it received the Department's response, Ms. Cain visited the Licensee's residence as part of the annual relicensing process. When she arrived at the home, day care children were present and it was evident that the Licensee had taken a shower. The Licensee's hair was wet and she was in a robe. No other adult was awake and present. Ms. Cain noted the following rule violations at the home on a correction order dated April 9, 1998: (1) an admission and arrangement form was missing for one child; (2) an immunization form was missing for one child; (3) three outlet receptacle covers were missing; (4) an "unbearably strong" odor of cat urine and feces was noted in a bedroom on the main level of the home, next to the master

bedroom; (5) the Licensee had taken a shower while children were in care and thus had failed to adequately supervise the children; (6) the front door was blocked by a walker and a box of toys; (7) the black cat in the household had not had rabies shots; (8) the Licensee provided false information by stating that that she only had two cats when she in fact had three cats; (8) a solid gel-type room deodorizer was placed on the kitchen counter within reach of a toddler setting at the counter, there were toxic items underneath the bathroom sink, and a fluid film aerosol can was lying next to the entrance steps; and (9) a long-handled axe, hammer, and screwdriver were lying on the ground next to the front entrance steps. With respect to the fourth item, Ms. Cain observed that excess cat litter had overflowed the litter pan located in the closet of the room, cat feces were both in the litter box and on the floor, and powered deodorizer was on the floor of the room. The bedroom is that of Jill Kerkaert, the Licensee's 17-year-old daughter. Jill's bedroom is not used for day care. With respect to the eighth item, the Licensee initially said that she had two cats. A black cat later appeared and the Licensee was unable to provide rabies information for that cat. (Ex. 8; Testimony of Cain, Mr. Kerkaert.)

11. In a letter dated May 6, 1998, the Department of Human Services issued an Order of Conditional License. The letter noted that, based upon the County's recommendation, the Commissioner was placing the Licensee's license to provide family day care on conditional status for a period of two years. Under the Order of Conditional License, the Licensee was permitted to continue to operate with a conditional license provided she followed and complied with all parts of the day care rules, no variances to age distribution or capacity were granted, the Licensee kept daily attendance records with the names, birthdates, and hours of care for all children and submitted them to the County licensor by the first of every month; the Licensee obtained at least six hours of additional training in the area of child health and safety; the Licensee developed a plan approved by the licensor to address how she would maintain compliance with sanitation and health requirements in the rule; and the Licensee developed a plan approved by the licensor outlining how she would provide supervision of the day care children so that she was always capable of intervening to protect their health and safety. The letter indicated that the County licensor would monitor her compliance with these terms and with the rules as a whole and stated that the monitoring might include unannounced visits. Finally, the letter warned that **"[f]ailure to comply with the stipulations of your conditional license or any other provisions of Minnesota Rules and Laws may result in revocation of your license."** Ex. 7 (emphasis in original). The Licensee did not request reconsideration of this Order. (Testimony of Ms. Kerkaert.)

12. The Licensee submitted a plan to the County addressing sanitation, health, and supervision issues by June 15, 1998. Although the County tentatively approved the plan, Ms. Cain and Ms. Otremba asked in a letter dated June 18, 1998, that the Licensee revise the plan to cover some additional points and resubmit it by June 26, 1998. (Ex. 25; Testimony of Mr. Kerkaert.)

13. The Licensee submitted a second plan to the County. The second plan was received on June 26, 1998, and was approved by the County. The plan indicated that

day care children would always be supervised by the Licensee, her daughter Jill, or her sons Jayson and Justin. It also indicated that the Licensee would take a shower before the children arrived and she would make sure that there were no toxic chemicals within the reach of the children, the gate was shut when she had children between the age of six and 18 months, the gate between the toy room and the furnace room was always up during day care hours, the outlets were covered when not in use, immunization and admissions records were kept up to date, the first aid kit was kept up to date, and "all 3 cats" were kept up to date on their shots. The plan included the following sanitation approaches: the garbage and diaper pails would be emptied daily, dishes would be done after meals, floors would be swept or vacuumed daily, children's hands would be washed before meals and after toileting, the Licensee's hands would be washed after toileting and changing diapers, the potty chair would be washed out daily, blankets and pillow cases would be washed weekly, the bathroom would be cleaned daily, and bottles would be washed after every use and labeled with the child's name. With respect to the litter box sanitation issues, the Licensee's plan indicated that the litter box would be scooped or changed daily, Jill's room would be cleaned daily and vacuumed, no litter would be kept in her room, the door would be locked during day care and would not be used for day care purposes, and the children would know that the room was off limits. Finally, the plan indicated that children would be supervised when they were outside by the Licensee, Jill, Jayson, or Justin. (Ex. 9; Testimony of Cain, Mr. Kerkaert.)

14. On July 7, 1998, Ms. Cain and Ms. Otremba made an unannounced visit to the Licensee's residence to ensure that she was in compliance with the conditions placed on her license. During this visit, the Licensee first said that she had two cats and later corrected that after further questioning and said that she had four cats but only two had papers from the veterinarian. Ms. Cain asked to see Jill's bedroom. The Licensee said that she needed a key but it appeared to Ms. Cain that the door could have been opened without a key by merely pushing in a small device. They again saw a box obstructing the front door. They did not see what was inside. During the visit, they observed a nine-month-old child crawling towards the open gate at the top of the stairs. A correction order was issued on July 8, 1998, stemming from this visit. The correction order noted the following violations: (1) false information was given regarding the numbers of pets; (2) County workers were denied access to Jill's room; (3) the front door was not free of obstruction; (4) the gate was not in place for the infant in care; (5) the sanitation plan was violated because the litter boxes in the basement had not been emptied on a daily basis; and (6) pets housed in the residence did not have current vaccination records. The Licensee's son, Jayson Kerkaert, called Ms. Otremba and Ms. Cain "sons of bitches" during this visit. (Testimony of Otremba.)

15. The obstruction noted near the front door was a cardboard box that was approximately two feet by one foot in diameter. Neither Ms. Otremba nor Ms. Cain looked inside the box or lifted the box. In their opinion, it appeared that a toddler would not have been able to move the box. The box was, in fact, empty and it was possible to move it easily and also open the door without moving it. (Ex. 10; Testimony of Cain, Otremba, Jayson Kerkaert.)

16. William Fish, Jr., an employee of Opie's Plumbing, Heating, and Air Conditioning, was installing air conditioning at the Licensee's home on July 7, 1998 and was present at the Licensee's home during Ms. Cain's and Ms. Otremba's visit. The Licensee submitted a statement by Mr. Fish in which he indicated that he felt that Ms. Cain and Ms. Otremba were very rude and inconsiderate during that visit. (Ex. 34; Testimony of Mr. Kerkaert.)

17. In a letter dated July 8, 1998, the County recommended that the Licensee's family day care license be revoked. The recommendation was based upon the fact that several areas of noncompliance were found during the July 7, 1998, unannounced visit, certain violations were repeated in nature, access had been denied to Jill's room, false information had been provided regarding the animals, and the County believed that it could not ensure the protection, proper care, health, safety, and development of the children or that minimum levels of care and service would be given. (Exs. 11, 26; Testimony of Cain.)

18. In a letter dated August 26, 1998, the Department notified the Licensee that it was revoking her license to provide family day care. The revocation order was based upon the Licensee's refusal to allow access to a room that was to be cleaned daily according to the Licensee's approved sanitation plan; the Licensee's failure to scoop or change the cat litter box in her home on a daily basis in accordance with the sanitation plan she had submitted; the Licensee's failure to have current veterinarian records for each of her cats in violation of the plan; the Licensee's giving of false information regarding the number of cats in the home; the fact that a large box blocked the front door; the Licensee's inability to provide enrollment information to the licensor in accordance with her conditional license; and the Licensee's failure to secure a gate at the top of the stairs when she had an infant in care between the ages of 6 and 18 months. The Department concluded that the license should be revoked because, "[d]ue to the chronic nature of these violations" the County "cannot ensure minimum levels of care and safety of children in your care" The letter notified the Licensee of her right to appeal the decision and request a contested case hearing. (Ex. 12; Testimony of Cain.)

19. The Licensee filed a timely appeal of the revocation order, and this contested case proceeding was initiated.

20. On October 12, 1998, Ms. Cain and Ms. Otremba again visited the Licensee's home, accompanied by Pam White, another County employee. A correction order was also issued with respect to this visit. The following violations were noted: (1) baby bottles were not labeled with the child's name; (2) a pen, coin, curtain hooks, screwdriver, open can lid, and small battery were within the reach of infants, toddlers, and preschoolers; (3) the Licensee was unable to produce the solution of chlorine bleach and water used as a disinfectant after diapering; (4) an infant was sleeping on the sofa rather than in a crib as required by the rules; (5) the laundry area where the cat litter box was kept did not have a secured gate to make it inaccessible to children; (6) the Licensee did not have an admissions and arrangements form on hand for a toddler in her care; and (7) workers were again denied access to Jill's room. The bottles were not labeled that day because they had just been washed. The Licensee

did not always have children who drank from bottles in care. The Licensee was sitting on the couch while the infant was sleeping on the couch. The Licensee admitted not cleaning the litter box on a daily basis. The Licensee had never previously been cited for failure to have the disinfectant solution. The child who lacked records was only in the Licensee's day care for two months. (Ex. 13; Testimony of Cain, Mr. Kerkaert.)

21. When the Licensee did not allow the County workers to see Jill's room, they asked her if she was sure she was denying access and told her that they viewed it as a direct violation of her probationary plan. The Licensee continued to deny them access to the room despite being told this. (Testimony of Otremba.)

22. At the hearing, the Licensee submitted vaccination records for three cats. "Duke," a male cat both in April, 1995, received a 1-year rabies booster on April 10, 1998, and a feline leukemia vaccination on October 20, 1997. "Cry Baby," a female cat born in January, 1994, received a rabies vaccination on April 3, 1997, that was good for two years, an additional rabies vaccination on September 1, 1998, and a feline leukemia vaccination on November 28, 1997. Finally, "Archie" or "Kitty," a male cat born in June, 1995, received a rabies vaccination and a feline leukemia vaccination on June 19, 1998. (Exs. 37-38; Testimony of Ms. Kerkaert.) No records were submitted with respect to a fourth cat.

23. Three written statements were submitted by the Licensee from parents of children who have been in her care, one from an individual who has attended the day care, and one from her son, Justin Kerkaert. (Exs. 29, 30, 32, and Post-Hearing Submissions received on Nov. 20, 1998, and Nov. 23, 1998.) In addition, six parents of children who have been in the Licensee's care testified at the hearing on behalf of the Licensee. (Testimony of Zoller, Lietzau, Yanish, Schmitz, Jennings, Miller.) Those who testified and provided testimony expressed confidence in the Licensee's ability to provide day care, supported her continued day care licensure, and indicated that they found the Licensee to be a competent and caring day care provider. They stressed that the Licensee is willing to take children with health problems or disabilities and learn to perform necessary medical procedures. (Testimony of Zoller, Yanish, Schmitz, Jennings). They also emphasized that the Licensee provides care at a less expensive price than others in the Watkins area. (Testimony of Lietzau, Jennings.)

24. The Licensee also submitted a statement from Lynette Wagner, who is an Early Childhood Special Education teacher for the Eden Valley-Watkins School District. Ms. Wagner goes into the Licensee's home to provide services to young children with special needs and occasionally asks the Licensee to carry out recommendations. She indicated that the Licensee was very observant, frequently reported to her the progress or gains made by the children, and provided a valuable service to many families in the School District. (Ex. 31.)

25. Jill's room was not used for day care and was off-limits for day care children. (Testimony of Mr. Kerkaert, Lietzau, Yanish, Jennings.) There is no evidence that any day care parents ever smelled cat urine or feces in the home. (Testimony of Zoller, Lietzau, Yanish, Schmitz, Jennings, Miller.)

26. The County submitted a post-hearing affidavit by Ms. Otremba specifying the dates that relicensing visits were conducted for six other Meeker County day care providers. With one exception, relicensing visits were completed at least once every twelve months for each of these providers. The only exception was that the 1994 relicensing visit for Mary Gruenes was conducted eighteen months after the 1993 relicensing visit. At the time of the County's last visit to Ms. Gruenes, she had no children in care. (Testimony of Otremba.) There is no evidence that correction orders were issued to any of these six providers.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50, 245A.05, and 245A.08.

2. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of law or rule have been fulfilled.

3. The governing statute describes the burden of proof in hearings regarding revocation of a family day care license as follows:

At a hearing regarding suspension, immediate suspension, or revocation of a license for family day care . . . , the commissioner may demonstrate reasonable cause for action taken by submitting statements, reports, or affidavits to substantiate the allegations that the license holder failed to comply fully with applicable law or rule. If the commissioner demonstrates that reasonable cause existed, the burden of proof in hearings . . . shifts to the license holder to demonstrate by a preponderance of the evidence that the license holder was in full compliance with those laws or rules that the commissioner alleges the license holder violated, at the time that the commissioner alleges the violations of law or rules occurred.

Minn. Stat. § 245A.08, subd. 3(a) (1998). This allocation of the burden of proof withstood a due process challenge in In re Judith Cullen, No. C4-88-2609 (Minn. Ct. App. July 18, 1989).

4. Minn. Stat. § 245A.07, subd. 3 (1998), authorizes the commissioner to "suspend, revoke, or make probationary a license where the license holder fails to comply fully with applicable laws or rules." The statute further provides that, "[w]hen applying sanctions authorized under this section, the commissioner shall consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program." Minn. Stat.

§ 245A.08, subd. 1 (1998); see also Minn. Rules pt. 9543.1060, subp. 2 (1993) (before issuing a negative licensing action, the Commissioner is required to take into consideration the laws or rules that have been violated, the nature and severity of each violation, whether the violation is recurring or nonrecurring, the effect of the violation on persons served by the program, an evaluation of the risk of harm to persons served by the program, any evaluations of the program by persons served or their families, relevant facts, conditions, and circumstances concerning the operation of the program, and any aggravating or mitigating factors related to the violation).

5. Minn. Stat. § 245A.07, subd. 3, authorizes the Commissioner to “suspend, revoke, or make probationary a license if a license holder fails to comply fully with applicable laws or rules or knowingly gives false or misleading information to the commissioner in connection with an application for a license or during an investigation.” The County serves as the representative of the Commissioner in family day care matters.

6. The Commissioner has demonstrated reasonable cause for adverse action against the Licensee’s license based on the Licensee’s failure to comply fully with the statute and rules governing the provision of family day care and her failure to comply fully with the conditions placed upon her licensure. Specifically, the Commissioner has established reasonable cause to believe that the Licensee refused the County workers access to a room that was to be cleaned daily according to the Licensee’s approved plan to maintain compliance with the sanitation and health requirements in the rule; the Licensee did not scoop or change the litter box in her home on a daily basis in accordance with the approved plan; the Licensee did not have current veterinarian records for each of her cats as required by the approved plan and Minn. R. 9502.0435, subp. 12; the Licensee gave false information regarding the number of cats in the household on two occasions, in violation of Minn. Stat. § 245A.07, subd. 3; and the Licensee did not secure a gate at the top of the stairs when she had an infant in care between the ages of 6 and 18 months as required by the approved plan and Minn. R. 9502.0425, subp. 1(c). The Commissioner has not demonstrated reasonable cause to believe that the front door to the Licensee’s home was obstructed or that the Licensee failed to provide enrollment information to the County workers during their visit on July 7, 1998.

7. Under Minn. Stat. § 245A.08, subd. 3(b) (1998), after the Commissioner demonstrated reasonable cause, the burden of proof shifted to the Licensee to demonstrate by a preponderance of the evidence that the Licensee has complied fully with applicable provisions of the statute and rules governing the provision of family day care. The Licensee has failed to show by a preponderance of the evidence that she was in full compliance with those laws and rules.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED that adverse action be taken against the family day care license of Connie Kerkaert.

Dated this 14th day of January, 1999.

BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

The Licensee has provided licensed family day care for more than eight years and is regarded as a competent and caring day care provider by parents of the children in her care. She also provides day care on a low cost basis and is willing to care for children with medical problems, and thereby fills a pressing need for many parents. Unfortunately, the County licensing workers have discovered numerous rule violations at the Licensee's day care home since 1992, leading to the placement of conditions on her licensure on May 6, 1998. The Licensee complied in significant respects with the terms of the conditional licensure by, for example, developing a plan to address how she would maintain compliance with the sanitation, health, and supervision requirements in the rule. She did not, however, comply with all of the provisions of that plan or the rules governing family day care.

The evidence presented at the hearing established that the Licensee provided false information or, at a minimum, misled the County workers about the number of cats in the household, failed to provide vaccination records for all four of the cats she eventually admitted to the County that she had, and refused to allow the County licensing workers access to her daughter's bedroom on two separate occasions. The Licensee told the licensor that she had two cats on April 6, 1998. When a black cat later appeared, the Licensee was unable to provide vaccination information regarding that cat. The Licensee's draft plan submitted in June, 1998, included a promise that "all 3 cats" (emphasis added) would be kept up-to-date on their shots. Then, on July 7, 1998, the Licensee told the licensor that she had four cats but only two were current on their shots. The records submitted by the Licensee at the hearing show that three cats were up-to-date on their rabies vaccinations as of June, 1998. No vaccination information was submitted with respect to a fourth cat, and it is unclear precisely when that cat was acquired. The Licensee had promised to maintain the cleanliness of her daughter's room under the sanitation plan. The testimony of the County workers that the door to the room, while locked, could have been opened easily was unrefuted by the Licensee. Although the room was not used for day care purposes and thus apparently would not be subject to inspection under Minn. Stat. § 245A.04, subd. 5 (allowing access to the "physical plant and grounds where the program is provided"), the County's need to inspect the room to assess compliance was implicit in the plan agreed to by the Licensee.

The County also showed that other violations of the plan and relevant rules had occurred. The Licensee admitted to the County workers on July 7, 1998, that she had

not scooped or changed the cat litter box on a daily basis, despite the inclusion of such a provision in the plan. There was no testimony at the hearing concerning the actual condition of this litter box. In addition, the gate at the top of the stairs was not secured at the time of the July 7 visit, even though an infant was in care. Moreover, on October 12, 1998, several other violations were noted with respect to the labeling of bottles, the accessibility of potentially harmful household objects, the use of disinfectant, infant sleeping space, the use of a gate to make the laundry and litter box area inaccessible to children, the availability of an admissions and arrangements form, and a second denial of access to Jill's room.⁴

The seriousness of these violations of the day care rules and the provisions of the plan cannot be overlooked. Ms. Otremba testified that it was customary for the County to conduct monthly inspections to check on prior correction orders. The County is responsible for ensuring the health and safety of children in care, has a legitimate interest in viewing the day care residence and ensuring that violations have been corrected, and in fact has an obligation to do so. The County was understandably concerned about the health and safety of the children in the Licensee's care given the number of violations noted at the Licensee's residence and the fact that the same violations were found over and over despite the Licensee's assertion that she had complied with the correction orders issued by the County. Under the circumstances, the County wisely chose to monitor the Licensee's day care more closely beginning in 1997. The Administrative Law Judge thus finds that the County's increased use of unannounced visits to the Licensee's day care did not reflect an attempt to single out the Licensee for unfair treatment. There is no evidence in the record of this proceeding that the day care homes with which the Licensee seeks to compare herself had a similar number of correction orders or repeated violations.

The governing statute requires that the "nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program" be considered when applying sanctions. In this instance, the Administrative Law Judge respectfully urges the Commission to consider the imposition of a penalty less severe than revocation. This recommendation is made because the violations, although repeated and inexcusable, do not rise to the level of severity that compels revocation of the Licensee's license. The parents testifying at the hearing indicated that they did not notice cat odor; in fact, several of the parents were not even aware that the Licensee had cats. The litter box sanitation problem was confined to a room that was off limits to day care children. There is no evidence that day care children had contact with the cats. The Licensee in fact permitted the County workers to have access to Jill's bedroom on one occasion. The later refusal to unlock the door appears to have been based upon a misunderstanding of the plan requirements and a concern for Jill's privacy. The imposition of a serious penalty, such as suspension of the license for a period of time, followed by a probationary period requiring strict compliance and frequent unannounced visits, should emphasize the importance of compliance with the day care rules while avoiding the harsh result of revocation.

B.L.N.

* Neither party testified in detail at the hearing about the availability or non-availability of enrollment records during the County's visit on July 7. Various exhibits submitted by the County include the assertion that the Licensee was unable to provide enrollment information during the visit. In her post-hearing submission, the Licensee asserts that she did, in fact, submit the required reports to the County. Due to the lack of hearing testimony on this issue, the Administrative Law Judge does not have an adequate opportunity to assess the credibility of the parties' positions, and does not believe that this issue should be given weight in determining whether adverse action against the Licensee's license is appropriate.